

FWD Corporation and Local No. 815 of the International Union, Allied Industrial Workers of America, AFL-CIO and Office and Professional Employees International Union, Local 515.
Cases 30-CA-6114, 30-CA-6276, and 30-CA-6305

September 15, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND
ZIMMERMAN

Upon charges filed on October 23, 1980, and on January 14, 1981 (the latter being amended on February 4 and February 11, 1981), by Local No. 815 of the International Union, Allied Industrial Workers of America, AFL-CIO (hereinafter called AIW), and duly served on FWD Corporation (hereinafter called Respondent), and upon a charge filed on January 30, 1981, and amended on February 12, 1981, by Office and Professional Employees International Union, Local 515 (hereinafter OPEIU), also duly served on Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 30, issued a consolidated complaint and notice of hearing on April 2, 1981, against Respondent, alleging that Respondent had engaged in, and was engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charges, consolidated complaint, and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the consolidated complaint alleges, *inter alia*, that by virtue of collective-bargaining agreements with AIW and OPEIU, the most recent contracts each being effective by their terms for the period from October 1, 1978, through September 30, 1981, these Unions have been and are now the exclusive bargaining representatives of all employees in the following respective appropriate units:

AIW—All production and maintenance employees, excluding probationary employees, executives, office clerical employees, engineering department employees, sales and service trainees, field servicemen, and all supervisory employees with the authority to hire, promote, discharge, discipline, or effectually recommend such action, for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment and all working conditions, and guards.

OPEIU—All salaried office employees, including buyers, excluding executives, field representatives, office managers, department heads, professional and confidential employees, guards and supervisors as defined in the Act.

The complaint, as amended on April 10, 1981, further alleges that Respondent has failed and refused, and continues to fail and refuse, to bargain collectively and in good faith with AIW as the representative of the employees in the above-described unit in violation of Section 8(a)(5) and (1) by: failing and refusing on or about July 31, 1980, and thereafter, to pay dental insurance premiums pursuant to the collective-bargaining agreement between Respondent and AIW and allowing the dental insurance policy to lapse; failing and refusing on or about January 1, 1981, and thereafter, to pay the cost-of-living adjustments pursuant to the same collective-bargaining agreement; telling AIW on or about January 13 and 15, and February 6 and 10, 1981, that it would refuse to meet with the AIW grievance committee unless and until it was reduced to three members from the current five members, and declining to meet with AIW five-member grievance committee on February 10, 1981, or thereafter, unless said committee was reduced to three members; and declining on or about February 9, 1981, to have grievance meetings with AIW unless persons designated by AIW were removed from its grievance committee. The complaint, as amended, also alleges that Respondent has failed and refused, and continues to fail and refuse, to bargain collectively and in good faith with OPEIU as the representative of the employees in the above-described unit in violation of Section 8(a)(5) and (1) by: failing and refusing on or about January 1, 1981, and thereafter, to pay cost-of-living adjustments pursuant to the collective-bargaining agreement between Respondent and OPEIU; and, on or about October 17, 1980, and thereafter, in violation of the same agreement, giving substantial amounts of unit work to nonunit members while unit members were on layoff status. Subsequently, Respondent timely filed an answer, and an amendment to its answer, to the consolidated complaint, as amended, admitting in part and denying in part the allegations contained therein.

Thereafter, on April 29, 1981, the General Counsel filed with the Board in Washington, D.C., a motion for partial summary judgment, with attached exhibits. The General Counsel requested summary judgment only on its allegations that Respondent failed to pay dental insurance premiums, allowed the dental insurance policy to lapse, and required employees to pay the costs of dental treatment which would otherwise have been paid by

the dental insurance carrier, all in violation of the AIW collective-bargaining agreement, and failed to pay the cost-of-living adjustments provided for in both the AIW and OPEIU agreements, thus violating Section 8(a)(5) and (1) of the Act.¹ On May 7, 1981, the Board issued an order transferring the proceeding to itself in Washington, D.C., and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent filed a response to the Notice To Show Cause.²

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In Respondent's answer to the consolidated complaint, as amended, it admits the allegations that it failed to pay contractually required dental insurance premiums on behalf of employees represented by AIW, that it allowed the dental insurance policy to lapse, and that it failed to pay cost-of-living increases to employees represented by AIW. Respondent further admits the alleged failure to pay contractually required cost-of-living increases to employees represented by OPEIU. Respondent seeks to excuse its conduct by stating that such action was "due to financial difficulties which later resulted in the filing of a petition under Chapter 11 of the Bankruptcy Code." This argument is repeated in Respondent's response to the Notice To Show Cause. It is well established, however, that an employer acts in derogation of its bargaining obligation under Section 8(d) of the Act, and thereby violates Section 8(a)(5) and (1) of the Act, when, during the life of a collective-bargaining agreement between it and a union, it unilaterally modifies or otherwise repudiates terms and conditions of employment contained in the agreement.³ It is equally well established that economic necessity is not cognizable as a defense to the unilateral repudiation of monetary provisions in a collective-bargaining agreement.⁴ We therefore find that no material

issues of fact exist regarding the allegations contained in paragraphs 8(a)(i), 8(b), and 13(a) and (b) of the consolidated complaint, as amended, which would warrant a hearing. Accordingly, we grant partial summary judgment as to the allegations contained in these paragraphs.

However, we deny the General Counsel's Motion for Summary Judgment in regard to paragraph 8(a)(ii) of the consolidated complaint as amended, which alleges that Respondent, since on or about July 1980, has required employees in the above-described AIW unit to pay their costs of dental treatment which would otherwise have been paid for by the dental insurance carrier. Respondent, in its amended answer to the consolidated complaint, as amended, denied this allegation, and, accordingly, it is clear that this is an issue which can only be resolved at a hearing.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a Wisconsin corporation, with an office and place of business in Clintonville, Wisconsin, is engaged in the manufacture and sale of fire-trucks. During the calendar year ending December 31, 1980, a representative period, Respondent sold and shipped products valued in excess of \$50,000 directly to points outside the State of Wisconsin.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction.

II. THE LABOR ORGANIZATIONS INVOLVED

Local No. 815 of the International Union, Allied Industrial Workers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

Office and Professional Employees International Union, Local 515, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representative Status of the Unions*

The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All production and maintenance employees, excluding probationary employees, executives,

¹ Inasmuch as the General Counsel has not sought summary judgment on the other allegations contained in the consolidated complaint, as amended, they will not be considered herein.

² On June 19, 1981, the General Counsel filed an opposition to Respondent's response. The opposition was rejected by the Office of the Executive Secretary by letter dated June 25, 1981. Thereafter, on July 8, 1981, the General Counsel filed a motion for reconsideration of the Board's rejection of its opposition. We hereby deny the motion for the reasons given in the letter of June 25, 1981, from the Executive Secretary.

³ *Morelli Construction Company*, 240 NLRB 1190 (1979).

⁴ *Nassau County Health Facilities Association, Inc., et al.*, 227 NLRB 1680 (1977).

office clerical employees, engineering department employees, sales and service trainees, field servicemen, and all supervisory employees with the authority to hire, promote, discharge, discipline, or effectually recommend such action, for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment and all working conditions, and guards.

Since 1962, and at all times material herein, AIW, by virtue of Section 9(a) of the Act, has been, and is, the exclusive collective-bargaining representative of the employees in this unit. AIW and Respondent have been parties to successive collective-bargaining agreements, the most recent of which is effective by its terms for the period from October 1, 1978, through September 30, 1981.

The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All salaried office employees, including buyers, excluding executives, field representatives, office managers, department heads, professional and confidential employees, guards and supervisors as defined in the Act.

Since 1973, and at all times material herein, OPEIU, by virtue of Section 9(a) of the Act, has been, and is, the exclusive collective-bargaining representative of the employees in this unit. OPEIU and Respondent have been parties to successive collective-bargaining agreements, the most recent of which is effective by its terms for the period from October 1, 1978, to September 30, 1981.

B. The Unilateral Changes

Since on or about July 31, 1980, and continuing to date, Respondent, without first giving notice to and bargaining with AIW, unilaterally modified the terms of the collective-bargaining agreement with AIW by failing to pay dental insurance premiums pursuant to the contract and allowing the dental insurance policy to lapse. Further, since on or about January 1, 1981, and continuing to date, Respondent, without first giving notice to and bargaining with the Unions, has unilaterally modified the terms of the collective-bargaining agreements with AIW and OPEIU by failing to pay the cost-of-living increases due under the terms of its respective contracts with each Union. Accordingly, we find that Respondent, by the foregoing conduct, has violated Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent, set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and that it take certain affirmative action designed to effectuate the purposes and policies of the Act. We shall order Respondent to make whole employees in the AIW-represented collective-bargaining unit by reimbursing unit employees for any dental expenses ensuing from Respondent's failure to pay dental insurance premiums. This shall include reimbursing employees for any premiums they may have paid to third-party insurance companies to continue dental coverage in the absence of Respondent's payment of dental insurance premiums under its policy, and for any dental bills they have paid directly to dental care providers that the contractual policy would have covered. Further, we shall order Respondent to make whole employees in the AIW-represented and OPEIU-represented collective-bargaining units involved herein by paying them their respective cost-of-living increases pursuant to their respective collective-bargaining agreements, which were not paid as a result of Respondent's unfair labor practices. All payments to employees shall be made with interest thereon computed in accordance with the formula set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977), and *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).⁵

The Board, upon the basis of the foregoing facts and entire record, makes the following:

CONCLUSIONS OF LAW

1. FWD Corporation is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local No. 815 of the International Union, Allied Industrial Workers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

⁵ Member Jenkins would modify the Order to require the interest due to the employees to be computed in the manner set forth in his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

3. Office and Professional Employees International Union, Local 515, is a labor organization within the meaning of Section 2(5) of the Act.

4. All production and maintenance employees, excluding probationary employees, executives, office clerical employees, engineering department employees, sales and service trainees, field servicemen, and all supervisory employees with the authority to hire, promote, discharge, discipline, or effectually recommend such action, for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment and all working conditions, and guards, constitute a unit of employees appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

5. All salaried office employees, including buyers, excluding executives, field representatives, office managers, department heads, professional and confidential employees, guards and supervisors as defined in the Act, constitute a unit of employees appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

6. At all times material herein, AIW has been the exclusive representative of all the employees in the appropriate unit described in paragraph 4, above, for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

7. At all times material herein, OPEIU has been the exclusive representative of all the employees in the appropriate unit described in paragraph 5, above, for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

8. By failing and refusing on or about July 31, 1980, and continuing to date, to pay dental insurance premiums on behalf of its unit employees and allowing the dental insurance policy to lapse, and by failing and refusing on or about January 1, 1981, and continuing to date to pay cost-of-living increases to unit employees pursuant to its contract with AIW, Respondent has refused to bargain collectively in good faith, and is refusing to bargain collectively in good faith, with AIW as the exclusive representative of Respondent's employees in the appropriate unit, described in paragraph 4, above, and thereby has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

9. By failing and refusing on or about January 1, 1981, and continuing to date, to pay cost-of-living increases to its unit employees pursuant to its contract with OPEIU, Respondent has refused to bargain collectively and in good faith, with OPEIU, as the exclusive representative of Respondent's employees in the appropriate unit described in paragraph 5, above, and thereby has engaged in, and is

engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

10. By the acts and conduct described in paragraphs 8 and 9, above, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, its employees, in the units described in paragraphs 4 and 5, above, in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

11. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, FWD Corporation, Clintonville, Wisconsin, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Unilaterally refusing to pay dental insurance premiums and the cost-of-living increase provided for in the collective-bargaining agreement entered into with Local No. 815 of the International Union, Allied Industrial Workers of America, AFL-CIO, effective by its terms from October 1, 1978, to September 30, 1981, covering employees in the following appropriate unit:

All production and maintenance employees, excluding probationary employees, executives, office clerical employees, engineering department employees, sales and service trainees, field servicemen, and all supervisory employees with the authority to hire, promote, discharge, discipline, or effectually recommend such action, for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment and all working conditions, and guards.

(b) Unilaterally refusing to pay cost-of-living increases provided for in the collective-bargaining agreement entered into with Office and Professional Employees International Union, Local 515, effective by its terms from October 1, 1978, to September 30, 1981, covering employees in the following appropriate unit:

All salaried office employees, including buyers, excluding executives, field representatives, office managers, department heads, professional and confidential employees, guards and supervisors as defined in the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the ex-

ercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with AIW as the exclusive bargaining representative of employees in the unit described in paragraph 1(a), above, regarding any payment of dental insurance premiums and payment of cost-of-living increases.

(b) Upon request, bargain collectively with OPEIU as the exclusive bargaining representative of employees in the unit described in paragraph 1(b), above, regarding payment of cost-of-living increases.

(c) Make whole the employees in the unit described in paragraph 1(a), above, in the manner set forth in the section of this Decision entitled "The Remedy," for Respondent's unlawful failure to pay dental insurance premiums and cost-of-living increases as required by its contract with AIW, effective by its terms from October 1, 1978, to September 30, 1981.

(d) Make whole the employees in the unit described in paragraph 1(b), above, in the manner set forth in the section of this Decision entitled "The Remedy," for Respondent's failure to pay cost-of-living increases as required by its contract with OPEIU, effective by its terms from October 1, 1978, to September 30, 1981.

(e) Post at its Clintonville, Wisconsin, facility copies of the attached notice marked "Appendix."⁶ Copies of said notice, on forms provided by the Regional Director for Region 30, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 30, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the issues raised by paragraphs 8(a)(ii), 9, and 3(a) of the amended consolidated complaint be litigated at hearing before an administrative law judge.

IT IS FURTHER ORDERED that the Regional Director for Region 30 arrange for such hearing and

that said Regional Director be, and he hereby is, authorized to issue notice thereof.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

WE WILL NOT unilaterally refuse to pay dental insurance premiums and the cost-of-living increase provided for in the collective-bargaining agreement entered into with Local No. 815 of the International Union, Allied Industrial Workers of America, AFL-CIO, effective by its terms from October 1, 1978, to September 30, 1981, covering employees in the following appropriate unit:

All production and maintenance employees, excluding probationary employees, executives, office clerical employees, engineering department employees, sales and service trainees, field servicemen, and all supervisory employees with the authority to hire, promote, discharge, discipline, or effectually recommend such action, for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment and all working conditions, and guards.

WE WILL NOT unilaterally refuse to pay cost-of-living increases provided for in the collective-bargaining agreement entered into with Office and Professional Employees International Union, Local 515, effective by its terms from October 1, 1978, to September 30, 1981, covering employees in the following appropriate unit:

All salaried employees, including buyers, excluding executives, field representatives, office managers, department heads, professional and confidential employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them in Section 7 of the Act.

WE WILL, upon request, bargain collectively with AIW as the exclusive bargaining representative of employees in the first unit described above, regarding any payment of dental insurance premiums and payment of cost-of-living increases.

WE WILL, upon request, bargain collectively with OPEIU as the exclusive bargaining representative of employees in the second unit de-

⁶ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

scribed above, regarding payment of cost-of-living increases.

WE WILL make whole, with interest, the employees in the first unit described above for our unlawful failure to pay dental insurance premiums and cost-of-living increases as required by our contract with AIW, effective by its terms from October 1, 1978, to September 30, 1981. WE WILL reimburse employees for any premiums they may have paid to third-party insurance companies to continue dental coverage in the absence of our payment of

dental insurance premiums under our policy, and for any dental bills they have paid directly to dental care providers that our contractual policy would have covered.

WE WILL make whole, with interest, the employees in the second unit described above for our unlawful failure to pay cost-of-living increases as required by our contract with OPEIU, effective by its terms from October 1, 1978, to September 30, 1981.

FWD CORPORATION